Supreme Court No. 84132-2
COA No. 27394-6-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re: The Termination of D.R. & A.R.

STATE OF WASHINGTON,

Respondent,

v.

D.R. and A.R.,

Petitioners

OPENING BRIEF OF MOTHER, T.R.

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A. ASSIGNMENT OF ERROR

The trial court erred by refusing to appoint counsel for D.R. and A.R. during the termination of parental rights trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Pursuant to RCW 13.34.100(6), children may be appointed legal counsel at the discretion of the trial court. Do children also have a constitutional due process right in their relationship with a parent, which can best be protected through the appointment of counsel in proceedings to terminate that parental relationship?

C. STATEMENT OF THE CASE

1. Factual Background.

Ms. T.R. gave birth to her daughter, D.R., on March 22, 1996, and to her son, A.R., on April 30, 1997. CP 1-8, 105-13. At the time, the family lived in Missouri, and Ms. R. suffered from domestic violence at the hands of the children's father. CP 2, 106; RP 24, 39, 656-57.

Ms. R. was aware that the stress level in her home affected her family, and she sought services for her children, including a psychiatric evaluation for A.R. and an Individualized Education Plan (IEP) for D.R., which recommended speech therapy and reading assistance. RP 656-57, 660-62. Upon the arrest and incarceration

of her husband, Ms. R. and the children relocated to Stevens County, Washington, in early 2003, to be closer to Ms. R.'s family. RP 675-76.

After their arrival in Washington, Ms. R. became involved with another abusive partner. RP 648. In order to protect her children from her abuser, Ms. R. voluntarily placed her children in foster care in 2004. Id.

An order of dependency and a dispositional order were entered on May 7, 2005, by which services were to be provided by the Department. RP 84-85, Ex. 3. Ms. R. completed each of the required services, completing the chemical dependency assessment and providing clean UA's. RP 85-86.[1] Ms. R. also completed a psychological assessment in March 2004, which resulted in a diagnosis of depression and PTSD, due to domestic violence. RP 86, 380-82; ex. 22. The same psychologist who conducted the 2004 assessment completed an updated assessment of Ms. R. in February 2008. RP 280-82; ex. 23. At trial, this psychologist testified that Ms. R.'s improvement was "really quite striking," and that her symptoms of PTSD and depression had resolved without medication, due to her "really

[1] Ms. R. was not found not to have any drug or alcohol dependency issues that required a treatment program. RP 85.

good work" in therapy. RP 384. In addition, Ms. R. completed a parenting assessment and successfully finished all parenting classes offered through the Stevens County Counseling Center. RP 88.

At trial, D.R.'s therapist, Dr. Lisa Estelle, testified that D.R. seemed to benefit from her visits with her mother, and Dr. Estelle did not find the visits she observed to be harmful to the child. RP 211-12. Dr. Estelle also stated that it would be positive for D.R. to have future visitation with her mother, and that as of the date of trial, D.R. still wanted such visits resumed. RP 237-39, 245-50.[2]

During the period of dependency, D.R. and A.R. were shuffled among several different foster placements, and their behavior deteriorated dramatically. RP 38, 53, 56, 67-69, 180, 196-99, 321-28. A.R. was eventually admitted to the Children's Study and Treatment Center (CSTC), the most restrictive psychiatric placement for a child his age, to treat his ADHD, impulsivity, and depression. RP 307, 360. A.R.'s psychologist stated that A.R. was likely to be discharged to another facility, rather than a foster home. RP 340. He noted that in addition to A.R.'s other needs, his

[2] Successful visitation between the mother and D.R. has, in fact, resumed since remand was granted.

classification as a sexually-aggressive youth (SAY) mandated specialized therapy and supervision. RP 341.

At the time of trial, D.R. was residing with a stable foster home, but one that was not considered pre-adoptive. RP 590; CP 56-60. D.R.'s therapist, Dr. Estelle, testified that D.R.'s behavior had improved to some degree, but that she still required a great deal of care and treatment, in a setting with no younger children. RP 201-04. Dr. Estelle also testified to D.R.'s need for a structured environment, with caregivers who were experienced and stable. RP 201, 205-06.

Due to the Department's insistence that D.R. and A.R. needed a high level of care, Ms. R. attempted to obtain additional training by taking on-line courses and studying the training materials given to licensed foster parents, taking the tests at the end of each chapter. RP 651.[3] Ms. R. repeatedly asked the Department to provide her with the same courses given to therapeutic foster parents, but was told unequivocally that the

[3] The Department even told Ms. R. that perhaps if she applied to become a licensed foster parent, she could receive the special training reserved for foster parents. RP 600. She thereafter studied for and completed the coursework for sexually-aggressive youth (SAY) and took domestic violence training at the Resource Family Training Institute, as well as video courses online, and received additional certificates, which DSHS then refused to accept. RP 651-52; ex. 301.

Department does not offer those types of classes to biological parents. RP 127, 598.

Despite her efforts, Ms. R. was told by the Department that she was not eligible for foster parent training, and that there were no simply no services she could complete to get her children back. RP 103; 143-44. Rather, the State's witnesses testified that D.R. and A.R. needed to know that "the story with their mom is done," and that the children needed "closure" on their relationship with their mother. RP 468, 476. The State's witnesses even stated that it was preferable for the children to effectively be orphaned – since all witnesses conceded that adoption was extremely unlikely for either child -- than to maintain any relationship with Ms. R. RP 118, 498-99.

The appointed GAL, Lu Haynes, testified that D.R. had consistently told her foster parents of her wish for resumed visitation with her mother, and had stated that she wanted a relationship with Ms. R. RP 426, 490. At trial, the GAL advocated a position contrary to her own client's wishes, and admitted that she had not seen D.R. in four years. RP 489. The GAL also admitted that she had never met A.R., in over four years of representation. RP 485-87.

On the first day of trial, March 20, 2008, Ms. R. requested that the court appoint counsel for D.R., whose twelfth birthday was two days away. RP 165. The court asked the GAL to discuss this matter with D.R. Id. On the next trial date, April 8, 2008, the court heard testimony from Dr. Lisa Estelle, D.R.'s therapist. Dr. Estelle testified that D.R. wanted to see her mother, and that contact with Ms. R. could be beneficial for D.R., and "certainly could impact her in a positive way." RP 238-39, 245, 250.

Although the mother's request for counsel on behalf of D.R. was repeated several times during the termination trial, it was ultimately denied by the trial court. RP 410-11, 417, 419, 426-27. In its decision, the court noted that although this denial of counsel would raise an appellate issue, and although D.R. had repeatedly indicated her desire for a relationship with her mother, that it was simply "too late in the game" for another lawyer to catch up with the progress of the case. RP 426.

At a trial commencing March 20, 2008, Ms. R's rights to D.R. and A.R. were terminated by Judge Rebecca Baker. RP 767-82; CP 88-94.

2. Appellate Proceedings

Ms. R. appealed the termination order, assigning error, among other findings, to the trial court's failure to assign counsel to D.R. Ms. R. also asked the Court of Appeals to appoint counsel for the children, which it did, on March 16, 2009.[4]

On appeal, the children argued that since the appointment of counsel for dependent children is discretionary in Washington, the due process rights of all dependent children guaranteed by the United States and Washington Constitutions remain unprotected. The State conceded error, noting that the trial court had abused its discretion in denying counsel for the children, and that both children's "significant legal concerns" were thus not represented at the trial.[5]

The Court of Appeals reversed the termination of Ms. R.'s parental rights and remanded the case for further dependency proceedings, but did not rule on the constitutional issue presented

[4] Ct. App. Div. III Letter, In re Dependency of D.R. and A.R., Consolidated Case Nos. 273946 and 273954 (Mar. 16, 2009).

[5] State's Mot. to Reverse and Remand, In re Dependency of D.R. and A.R., No. 27394-6-III, consol. with 27395-4-III (July 1, 2009).

by the children.[6] This Court accepted review of the issue,[7] narrowing its review to termination of parental rights cases only.[8]

D. ARGUMENT

A PARENT'S DUE PROCESS RIGHTS DEMAND THAT HER CHILDREN HAVE COUNSEL AT TERMINATION HEARINGS

1. A parent has a fundamental interest in her children. It is well established that a parent's relationship with a child is protected by the substantive due process clause of the Fourteenth Amendment. M.L.B. v. S.L.J., 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) ("[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment."). Accordingly, the United States Supreme Court has ranked choices about marriage, family life, and the upbringing of children as paramount in our society, and has recognized constitutional protections accordingly. M.L.B., 519 U.S. at 119. See also Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (marriage); Zablocki v. Redhail, 434 U.S. 374, 98

[6] Order, No. 27394-6-III consolidated with No. 27395-4-III (Sept. 14, 2009).

[7] Order, No. 84132-2, In re Dependency of D.R. and A.R. (May 7, 2010).

[8] Order, No. 84132-2, In re Dependency of D.R. and A.R. (June 2, 2010).

S.Ct 673, 54 L.Ed.2d 618 (1978) (marriage); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (raising children); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (raising children).

2. Because of a parent's fundamental interest in her children, a parent has a commanding interest in the accuracy of a termination hearing. A parent's protected interest in her child can only be overcome by a "powerful countervailing" state interest. Lassiter v. Dep't of Social Services, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). But even if such a countervailing interest does exist, a court must take the upmost care to ensure that a parent is not wrongfully deprived of the love, joy, and happiness that comes from being with one's child. See id. Because of the unique side effects of termination on both the child and parent, a parent has a commanding interest in the "accuracy and justice" of a termination hearing. Id.

Where a "fundamental liberty interest" such as the care and custody of a parent's children is at stake, or indeed, for a child who

also has a clear interest in protecting her family integrity, procedural safeguards must be zealously guarded. Santosky v. Kramer, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 71 L.Ed.2d (1982); In re Dependency of C.R.B., 62 Wn. App. 608, 614-15, 814 P.2d 1197 (1991). It is well-settled that a "parents' right to custody of their children is described as being rooted in the natural and the common law, and as being a sacred right that is more precious than the right to life itself." In re J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991); Santosky, 455 U.S. at 753.

When evaluating the sufficiency of procedural protections, courts analyze (1) the private interest at stake, (2) the risk of error created by the procedure used, and (3) the governmental interest supporting the use of the challenged procedure. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Although the parents' interests in these proceedings are well-settled, the children's interests at stake are arguably even greater. In proceedings to terminate their parental relationships, children face not only physical upheaval, but a direct and immediate severance of the bond with their biological parents and extended families. See, e.g., Kenny A. v. Perdue, 356 F. Supp.2d 1353, 1358-60 (N.D. Ga. 2005) (recognizing children's state and

federal constitutional right to counsel in parental rights proceedings). In termination of parental rights cases, where children face significant threats to their liberty and emotional well-being while in the custody of the State, this Court has recognized that foster children have substantive due process rights. Braam v. State, 150 Wn.2d 689, 698, 81 P.3d 851 (2003).

Here, as to the risk of error created by the failure to provide counsel to the children, the State already conceded the trial court's failure to appoint counsel was "not harmless."[9] Furthermore, the State has recognized that the children's legal concerns were "significant," and that the GAL was inadequate to represent the children's views to the court.[10] The risk of error in the fact-finding process was high and the potential prejudice was ultimately conceded by the State.

Finally, the State had, and presently has, no interest in avoiding termination trials that include proper procedural protections for children, such as the appointment of legal counsel. In sum, all three of the Mathews factors weigh in favor of providing legal counsel for children during parental rights termination trials.

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[9] State's Mot. to Reverse and Remand, In Re Dependency of D.R. and A.R., No. 27394-6-III, consol. with 27395-4-III (July 1, 2009).

[10] Id.

3. Accuracy and justice are advanced in a termination hearing by providing independent counsel to a parent's children. Due process of law is crucial to ensuring an accurate and just legal system. U.S. Const. Amend. V, IV. "A fundamental requirement of due process is 'the opportunity to be heard.'" Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (quoting Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)).

Washington's children are routinely denied an opportunity to be heard when courts fail to appoint them independent counsel at termination hearings. The other parties each represent their own unique combination of interests which may or may not be aligned with those of the children. This lack of representation causes significant and irreparable harm to children. See generally Motion of Amici Curiae for Leave to File Memorandum in Support of Children's Joint Motion for Discretionary Review; In Re Dependency of D.R. and A.R., (No. 27394-6-III), Amicus Curiae Brief of the Mockingbird Society, In Re Dependency of D.R. and A.R., (No. 27394-6-III).

In addition to harming children, this silence harms parents by limiting truth-seeking opportunities. The absence of zealous

advocacy by counsel inhibits the adversarial system. United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Such a denial of counsel renders the adversarial system presumptively unreliable. Id. If a child does not have counsel at a termination hearing, the many claims of the parties will not be subject to meaningful testing. See id. Without this testing, the truth cannot be reliably distilled. See California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (confrontation is the "the greatest legal engine ever invented for the discovery of truth"). Thus the less adversarial a termination hearing, the less likely truth and justice will prevail. See Lassiter, 452 U.S. at 28 ("If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel[.]")

Thus a parent's commanding interest in accuracy and justice can best be protected by ensuring that the adversarial system is properly functioning through providing a child with legal representation.

E. CONCLUSION

For the reasons stated above, Ms. R. respectfully asks this Court to find that the Due Process Clauses of the United States and Washington Constitutions require the appointment of counsel for children in proceedings to terminate their familial relationship with their parents.

DATED this 26th day of August, 2010.

Respectfully submitted,

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